UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ORIGINAL

FRANCIS FOGARTY, JR.,

Plaintiff,

Civil Case No. 15-v-01454 (GLS/DJS)

-against-

CITY OF TROY and City of Troy Police Officers KYLE JONES and ROBERT SMITH, both individually and/or as agents, servants, and/or employees of the City of Troy,

Defendants

EXAMINATION BEFORE TRIAL of the Defendant, Troy Police Officer **ROBERT SMITH**, held pursuant to notice, on January 23, 2017, at 1:40 p.m. in the law offices of Bailey, Johnson, DeLeonardis & Peck, PC, Pine West Plaza 5, Suite 507, Washington Avenue Extension, Albany, New York, before Mary Ellen Tardiff, a Shorthand Reporter and Notary Public in and for the State of New York.

APPEARANCES:

For the Plaintiff:
THE KINDLON LAW FIRM, PLLC
74 Chapel Street
Albany, New York 12207
GENNARO D. CALABRESE, ESQ.

For the Defendant City of Troy:
RICHARD T. MORRISSEY, ESQ.
Corporation Counsel
City of Troy
245 River Street
Troy, New York 12180

For the Defendants Kyle Jones and Robert Smith:
Bailey, Johnson, DeLeonardis & Peck, PC
Pine West Plaza 5, Suite 507
Washington Avenue Extension
Albany, New York 12205
BY: JOHN W. BAILEY, ESQ.

Also Present:
Kyle Jones

S T I P U L A T I O N S

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties hereto that presence and oath of a Referee be waived;

IT IS FURTHER STIPULATED AND AGREED that the transcript be signed and that the filing of the original transcript with the Federal Court be waived;

IT IS FURTHER STIPULATED AND AGREED that all objections, except as to form, are reserved until the time of trial;

IT IS FURTHER STIPULATED AND AGREED that this deposition may be utilized for all purposes as provided by the Federal Rules of Civil Procedure;

AND FURTHER STIPULATED AND AGREED that all rights provided to all parties by the Federal Rules of Civil Procedure shall not be deemed waived and the appropriate sections of the Federal Rules of Civil Procedure shall be controlling with respect thereto.

R O B E R T   S M I T H,

having been first duly sworn by the Notary Public, was examined and testified as follows:

EXAMINATION BY MR. CALABRESE:

Q. Can you state your name for the record?
A. Robert Smith, R-O-B-E-R-t S-M-I-T-H.
Q. My name is Gennaro Calabrese. I'm an attorney with the Kindlon Law Firm representing Francis Fogarty, the plaintiff in this action. You have had the pleasure of sitting through the entire testimony of Officer Jones?
A. Correct.
Q. And so you heard the rules that I laid out in the beginning of his testimony?

A. Yes, sir.
Q. So fair to stay that you will let me know if you don't understand any of my questions?
A. Absolutely.
Q. And you will let me know if you need a break?
A. Yes, sir.
Q. Have you ever been a named party in a lawsuit before?
A. To the best of my knowledge, no.
Q. Have you ever sat for a deposition before?
A. No, sir.
Q. Have you ever testified as a witness in a civil trial?
A. Yes, in my capacity as a police officer as a witness to, I believe, an accident several years ago.
Q. Okay. So it was a personal injury accident?
A. What exactly it was I don't recall, but yes.
Q. Would it be fair to say that neither the plaintiff or the defendant in that action were police officers?
A. Correct.

Q. Have you testified in criminal proceedings before?
A. Yes, sir.
Q. And you've testified at hearings and you've testified at trials, correct?
A. Yep. Correct.
Q. And you testified at grand juries?
A. Yes, sir.
Q. Did you review anything in anticipation of this deposition?
A. Yes, sir.
Q. What did you review?
A. The package provided to us by Mr. Bailey's office: Incident reports, some interviews, taped interviews, surveillance photos, anything that I would assume you have as well.
Q. Okay. Not including your attorneys, have you spoken to anybody in preparation for this deposition?
A. Officer Jones.
Q. Okay. And you discussed with Officer Jones, you know -- what did you discuss with Officer Jones?

A. Just get clarity of the incident as to rehash what exactly we remembered happening four years ago.

Q. Did you do that on your ride over today?

A. No, we drove over in separate vehicles.

Q. Did you have that conversation with Officer Jones within the last couple days?

A. Yes.

Q. Okay. Are you currently employed by the City of Troy Police Department?

A. Yes, sir. I am.

Q. And are you employed part time with any law enforcement agency?

A. No, sir.

Q. How long have you been employed by the City of Troy Police Department?

A. Since July 18, 2003.

Q. Were you employed -- have you been employed by any other law enforcement agencies?

A. No, sir.

Q. What is your current rank with the City of Troy Police Department?

A. Patrolman, canine handler.

Q. Can you tell me when you first observed Mr. Fogarty?

A. It was the date in question which I believe is the morning of December 23rd, 2012, about 1:25 a.m. He was running out of the Franklin Street Alley southbound and went to the south side sidewalk in front of me as I was driving the opposite direction on State Street responding to a foot pursuit.

Q. What type of vehicle were you in?

A. Marked 2008 Chevrolet Tahoe with City of Troy Police markings and canine markings on the side of it.

Q. You were in uniform that night?

A. Yes, sir. I was.

Q. What did you do when you first observed Mr. Fogarty?

A. He matched the description of the person that was given out. Again without having the ability to hear the radio audio, he matched the description that was given of a subject in foot pursuit. I pulled up next to him. Rolled my window down as he was traveling westbound on the south side of the sidewalk. Pulled up at a distance of about six to eight feet keeping him just in front of my vehicle with my window down and gave him verbal commands to stop running or he would be bit by the dog.

Q. The verbal commands, how were they given? Were you in a window or using something?

A. No, I was in the vehicle and I yelled with, you know, projected voice out the window which was rolled down. Troy police. Stop running. You're going to get bit by a dog.

Q. What happened next?

A. He had some sort of a black object in his right hand up against the right side of his face. He turned to his left, spinning around, keeping that object away from me and back peddled two to three steps at which point in time he had slowed to a jog/walk backwards. So I placed my vehicle into park, exited my driver's door closing it behind me, and put my hand on the driver's side rear door again giving a verbal commands: Stop. You're going to get bit by a dog.

Q. So when you say he was back peddling, was he back peddling towards your vehicle?

A. Away from me. Away from me. Away from my vehicle.

Q. Did you have your lights on at all?
A. I believe so because I was traveling the wrong way down a one way street. So I would assume, yep. But do not quote me on that.
MR. BAILEY: You just got quoted.
A. You got me.
Q. All right. Now, could you hear Mr. Fogarty saying anything at the time that he's in your view or at the time that you were saying things to him?
A. Correct. He took several steps backwards, back peddling from me. I had my hand on the rear door at which point in time if he did not comply and began to run again, I would deploy my canine partner for an apprehension. He stopped walking backwards and made several steps towards me advancing on me at which point in time he said, fuck you. I didn't do anything wrong. You're not arresting me.
At that point I took his actions coming towards me as, with those statements, as an act of aggression. And with him closing the distance on me I took that as a threat to -- my immediate reaction was not to deploy my canine partner but to then go to an immediate hands

on because he was within a distance to which I could reach out and physically grab him.

Q. Now, you said that he was holding an object up to, I guess, the right side of his head?

A. Correct.

Q. When he said those things to you, was he still holding that object to his head?

A. Yes, sir.

Q. Okay. At that point in time could you see what the object was?

A. No. I was -- again, it was a dark colored object that was probably three inches by five inches, six inches roughly, somewhat concealed by his face and his movements. We're trained to look at several things as the evolving situation goes on, one which is hands. Hands kill, and waist. So every movement starts with the waist. So I'm trying to watch his belt line which is where a weapon would be concealed along with his hands. And the object that was in his hands, which at that point I perceived as an immediate threat to me, not knowing what that object was at that point.

Q. Can you approximate the distance between the two of you when you decided to use your person instead of the canine?

A. He closed the distance to somewhere between five to seven feet.

Q. Okay. All right. So what happened next?

A. At that point in time I made a movement towards him, stepped one step towards him to initially continue to close the gap. I then took my right hand, again giving all verbal commands throughout the duration of time that I've been -- strike that. You can't strike that but -- so after the second canine warning I think gave verbal commands to drop what's in your hand. Drop the object in your hand. He did not comply with that.

Once the distance was closed, and I stepped in and finished to close the distance, I reached out to my right hand. He had a black jacket over a hooded sweatshirt so I reached out, was able -- he was close enough I was able to reach around to the back of him, grab the jacket and hood at the back of his neck, and use his body weight and my leverage to lift him off of the ground and place him face first onto the sidewalk.

Q. Does that technique have a name?

A. It may. I do not know it. It was just between training and instinctual action. It was just this gentleman needs to be put on the ground. He is to be arrested and he's not complying. My immediate instinct was to assist him to the ground which is a normal practice to place people on the ground in a prone position at which point in time you get their hands to place them behind their back.

Q. Okay. So this all occurs in front of you, right? So you lift him up. You grabbed him, lift him up and put him on the ground. This is all while you're facing him?

A. We are facing each other. I reach around him at which time I turned to my left, pick him up and in a leftward swinging motion I put him to the ground.

Q. What parts of his body hit the ground, if any?

A. He, as I believe an instinctual action, brought his hands in front of him. So he landed with his forearms and elbows underneath his body at which point in time I continued to give verbal commands. Put your hands behind your back. Put your hands behind your back. Stop resisting.

Q. When you placed him on the ground were his feet extended out or were they tucked in?

A. Extended out.

Q. Okay. Did you see him hit his head on the ground when you put him on the ground?

A. I do not recall if his head hit the ground or not. I am not sure.

Q. But at no time -- I mean, you didn't flip him over or anything, right?

A. To face me?

Q. Meaning that you didn't flip him so that he landed on the top of his head, right?

A. No. His chest, his upper chest area, I would say, would be the first thing to make contact with the ground.

Q. Okay. Now, at any point in time while Mr. Fogarty was running, did you see him fall?

A. No.

Q. Okay. And would it be fair to say that once you made, once you began to observe him, you continued to observe him the entire time that the two of you were in each other's presence?

A. Correct.

Q. Okay. Did you hear Mr. Fogarty -- as you sit here today do you now know what the object was that he was holding in his hand up to his head?

A. I know now because after it was taken from him it was identified to be a phone.

Q. Did you hear -- at any point in time did you hear him talking into the object?

A. As it was removed from him he was, he screamed, mom, mom, which I didn't understand, later finding out that the object that was slid away from him was a phone and he had been talking to his mother. But that was all after the use of force had stopped.

Q. So it's your testimony that at no time did you hear him talking into the phone or did you hear a voice coming out of the phone before he was on the ground?

A. It would be my testimony that until he was already frisked and in handcuffs and the situation deescalated, I had no idea what that object was nor did I hear any type of verbal communication back and forth to indicate to me that that was a phone.

Q. When he was placed on the ground, did the object leave his hand or did it stay in his hand?

A. It stayed in his hand, his right hand.

Q. All right. So you get him to the ground. What happens next?

A. I place him on the ground. He's got his arms underneath him in a manner of some sort to try to brace his fall. I would assume I reached underneath with my left hand to get his left hand out from behind his back. With my right hand pressed in the middle of his back giving verbal commands: Drop what's in your hand. Drop what's in your hand. Put your hands behind your back.

Q. And where were your legs at this point?

A. My legs? I would be somewhat straddling his left leg standing over the top of him. My waist would be somewhere around the same waist area as his and I would be bent over in a manner to try to get his arm out from underneath him.

Q. At that point were you using your knees for pain compliance to try to keep him on the ground?

A. My knees, no.

Q. So your knees were not on his body at that time?

A. No. I was in a bent over position almost to a three point stance as you would consider it, using his back with my right arm and my feet planted on the ground as a way to control my body weight in an attempt to physically remove his left arm from underneath his body.

Q. So you had him -- just to make sure I understand, so you had him flat on the ground. You're next to his body. And you're trying to take his hand from underneath so you can put him handcuffs?

A. Correct.

Q. What happened next?

A. He failed to comply with all of those commands to drop the object that was in his hand. His right hand at this point had come out from underneath his body but, again, was clenched up in an area somewhat next to his head with that black object still in his hand. At which point in time I turned my attention to the biggest threat at that point in time which was the object that was in his hand. Whatever this object was at this point could be considered a weapon and used against me in a manner that could severely injure me or cause imminent death.

Q. All right. So what happened next?

A. I somewhat pushed off to disengage because at that point in time, again, with that object, not knowing what it is -- we get officer safety on a regular basis of objects that appear to be phones that are handguns and/or have trigger objects that can protrude a sharp object from them, a knife. So I'm taking that as a threat. I pushed off to almost disengage because at this point I feel that I'm at a disadvantage with whatever it is he has and I have only my, my hands. So I'm at a disadvantage because he already has something in his hand.

I was going to go to either canine or firearm and give verbal commands at gun point. Just before I do that Officer Jones comes into the picture which then gives us the, ups the ante, per say, and brings us more to an even level because I could control one arm and he could control the other arm at that point.

Q. When Officer Jones approached, was Mr. Fogarty still on the ground?

A. Mr. Fogarty was on the ground using both hands. One that I could not retract from underneath his body and the hand with his object almost in a push up movement to try to stand up and use his legs, kicking his legs to try to get him -- almost like you're doing a push up to try to get up and get away from me.

Q. When Officer Jones arrived were his legs flat out or was he kind of up on his knees?

A. Again, his legs and knees were behind me so I couldn't. I was more focused on upper body, object in hand. I know his legs were moving and I know his upper body kept attempting to get up. From the position that I put him on the ground to the position where he was actually placed in handcuffs, his body had moved two to three feet during the struggle that ensued.

Q. Would it be fair to say that at all times his body was parallel to the ground?

A. Yes. Parallel or at any point in time his knees may have come underneath him or he may have been on the balls of his feet in an attempt to stand. But at no point in time was he standing up perpendicular to the ground in an attempt to run. He was always in a semi prone position.

Q. Would it be fair to say at no point he was kneeling up?

A. No. His lower body was always at least, he had at least three points of contact which would have been both legs and one hand. The other hand may have come up, but he was at all points in time three points of contact at a minimum in an attempt push up and pull himself away from us.

Q. At any point in time did he strike you?

A. No.

Q. Okay. At any point in time did he attempt to swing at you?

A. No, he had no opportunity for that.

Q. So is it fair to say you didn't get injured during the event?

A. Just my pride.

Q. So Officer Jones, you see Officer Jones, what happens next?

A. Officer Jones comes into the picture. Again at this point in time I feel more comfortable of staying hands on and not transitioning to the next step of force which would be canine and/or firearm. And I'm more confident that the tools we have on our belt, hands and/or a baton strike, would be sufficient in going to take the subject into custody during his active resistance.

Q. Did you know Officer Jones was going to use the baton?

A. I did not.

Q. Is it fair to say that with the taser it's procedure to yell out that you're going to use a taser before you use it, correct?

A. Yes, we're trained. Taser, taser, taser and then deploy.

Q. Is there any similar rule for using a baton?

A. No.

Q. Did you see Officer Jones strike Mr. Fogarty with the baton?

A. Yes.

Q. Okay. Did you see where the baton struck Mr. Fogarty with each baton strike?

A. They were both in this general vicinity, his upper right shoulder area. And there were two fluid back to back immediate strikes from short distance in an attempt, I would assume, to gain pain compliance. And they were, again, in this area. What exactly they connected with, at no point in time could I see because I was more focused at this point on my task at hand which was I have his left arm. I needed to get his left arm behind him. Officer Jones is dealing with the right side of his body. He can address that issue and the object.

Q. So it's your testimony that you could not say whether or not one of Officer Jones's baton strikes struck Mr. Fogarty's head?

A. From my vantage point and what I was watching out of the peripheral vision I have, they struck him in the upper right portion of his body. Exactly which portions they hit, I am not sure.

Q. Would it be fair to say that once Officer Jones issued the baton strikes, Mr. Fogarty ceased struggling?

A. That's correct. Once the two baton strikes were given, Mr. Fogarty then began to comply. We took the object of out of his hand, placed both hands behind his back and place his hands in handcuffs at which time all use of force ceased.

Q. Just to back up a little bit. At any point in time did Mr. Fogarty approach your vehicle when you were still in it?

A. So I pull up. Verbal commands. He, again, spins around to his left, two steps, three steps backwards back peddling a little bit. I exit my vehicle. Again, second dog command. That's when he begins to close the gap.

Q. So it's your testimony that he never approached your patrol car while you were sill sitting in the driver's seat?

A. No.

Q. Did he ever ask you for help or assistance prior to the physical contact with him?

A. The only statement that I remember him making was, fuck you. You're not arresting me. I didn't do anything wrong.

Q. Do you know who placed Mr. Fogarty into a patrol car?

A. To the best of my knowledge it could have been myself and Officer Strock. And I believe he was placed into the back of Officer Bechard's vehicle. Officer Jones had already left to go back to his patrol car when he was placed into a patrol car to be brought to the police station.

Q. Did you have any other interaction with Mr. Fogarty?

A. Once he was placed in a patrol car and brought to the police station, I did not.

Q. You haven't seen him since, correct?

A. To be honest with you, I could have but I don't know.

Q. In your capacity as a police officer?

A. Not in my official capacity, no. I may have bought groceries in the same line with him behind me, but I couldn't tell you. I have no idea.

Q. At any point in time did you notice blood on Mr. Fogarty's head or face?

A. Yes, sir.

Q. All right. When did you first notice the blood?

A. After he was placed in handcuffs. He was still laying face down in a prone position. Officer Strock came up in a marked patrol car as well. He was working the same detail I was that evening. He came out. Officer Jones and I were trying to catch our breath, at which point in time Mr. Fogarty was laying face down on the ground handcuffed. Officer Strock asked if he had been pat frisked at this point in time. We said, no. Officer Strock did that, patted him down for any other weapons incident to arrest. And after that we noticed that he had blood coming from on his head that was running on his face and it made a small drip/pool of blood on the sidewalk where he was face down.

Q. Did you have an idea at that point in time as to where his injury came from?

A. Because the blood was coming from his head, I knew the injury was from his head, yes.

Q. I guess a better way, better question: Did you know what action caused the injury?

A. I did not at that point, no.

Q. Would it be fair to say you didn't strike Mr. Fogarty in the head at any point in time?

A. Did I? No, sir.

Q. And did you have a baton that night?

A. Being in a, having a canine partner, I carry one of the small expandable batons which was on my belt that I did not retrieve from.

Q. Okay. Do you know who retrieved the phone, the cell phone, from the scene?

A. Like brought it back to the police station?

Q. Yes.

A. Oh, I'm not sure. I don't know, sir.
Q. Do you remember it wasn't you?
A. I don't believe I immediately went to the police station. I was working a different detail. As far as I know, it was an extremely busy night. I believe we all had additional calls to go to, and I immediately went to a different call. And then went to the station and did my paperwork later. So I don't recall who took it. I would assume the officer that transported him, but I am not sure.
Q. Okay. The last exhibit was Plaintiff's Exhibit 5. Are you familiar with these documents?
A. Yes, sir.
Q. It's a supplement to Officer Jones' use of force report?
A. Correct.
Q. And you authored this document?
A. I did.
Q. Did anybody assist you in authoring this document?
A. Negative.
Q. Okay. And do you remember when you authored this document?

A. I believe I worked until 4:00 a.m. that morning. So sometime between the time of this and 4:00 a.m. unless I was -- I know I was supposed to work until 4:00 a.m. If it was that busy I may have worked a little over. But before the end of the shift and it was turned over to the supervisor for review.

Q. Do you remember, did you have the opportunity to read Officer Jones' use of force report before you wrote the supplemental?

A. I did not because I just recall that it was a very busy night in the course of events. And he was dealing with Mr. Fogarty as the arrested person.

Q. Do you remember talking to anybody from the Rensselaer County District Attorney's Office about Mr. Fogarty's case?

A. No.

Q. And you were interviewed by Internal Affairs regarding this incident?

A. Correct.

Q. And you were only interviewed once, correct?

A. Yes.

MR. CALABRESE: All right. I

don't have any more questions.
Thanks.

EXAMINATION BY MR. MORRISSEY:

Q. Are you familiar with the City of Troy's use of force policy with regard to baton use?
A. With what use?
Q. The City of Troy's use, baton use policy?
A. Yes.
Q. Did you witness anything about the use of the baton that night that was inconsistent with that policy?
A. No, sir. Not at all.
Q. Did you find it justified or unjustified due to the circumstances that you were dealing with?
A. Completely justified.
Q. And why?
A. Actively resisting suspect that had an unknown object at this point in his hand and we are trained to use all of the tools on our belt. The next step from open hand techniques would be escalation to use of baton for some sort of a pain compliance when someone is actively resisting and not compliant to place their hands behind their back.

Q. The baton strike that you witnessed, how many were there?
A. Two.
Q. And how quickly did they follow in succession?
A. Very quickly.
Q. There was no -- it was one right after the other?
A. Strike. Still active resistance. Strike again.
Q. Okay.
A. Then the resistance ceased.
Q. And the resistance ceased?
A. Correct.
Q. And use of forms also ceased?
A. Placed in handcuffs. End of use of force.
MR. MORRISSEY: Nothing further.
(Whereupon the deposition was concluded at 2:11 p.m.)

* * * *

I N D E X O F E X A M I N A T I O N

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ERRATA SHEET

I, Robert Smith, have read the transcript of my testimony taken on January 23, 2017, and would like the following changes:

Page	Line	Change From:	Change To:
9	22	--	me
11	15	to	with

PRN R. Smith
Robert Smith

Subscribed and sworn to before me
this 28 day of February 2017.

Dani Klein
Notary Public - State of New York

Dani Klein
Notary Public, State of New York
Qualified in Schenectady County
Comm. 5026256 - Expires April 18, 2018

STATE OF NEW YORK

SS:

COUNTY OF Albany.

I have read the foregoing record of my testimony taken at the time and place noted in the heading hereof and I do hereby acknowledge it to be a true and accurate transcript of same.

PRN R. Smith
ROBERT SMITH

Sworn to before me this

28th day of February, 2016.

Dani Klein
Notary Public

DANI KLEIN
NOTARY PUBLIC, STATE OF NEW YORK
QUALIFIED IN SCHENECTADY COUNTY
COMM. 5026256 - EXPIRES APRIL 18, 2018

CERTIFICATION

STATE OF NEW YORK

COUNTY OF ALBANY

I, Mary Ellen Tardiff, shorthand reporter, a notary public within and for the State of New York, duly commissioned and qualified, do hereby certify that **Robert Smith** was duly sworn by me to testify to the truth in the cause aforesaid; that the testimony then given was reduced by me to stenotype in the presence of said witness, subsequently transcribed into English text and that the foregoing is a true and accurate transcript of the testimony so given.

I do hereby certify that his testimony was taken **January 23, 2017**, at the place as specified in the foregoing caption.

I do hereby further certify that I am not a relative, counsel or attorney of any party or otherwise interested in the outcome of this action.

Witness my hand this 31st day of January, 2017.

MARY ELLEN TARDIFF

Notary Public for State of New York
Commissioned in Albany County
My commission expires 11/07/2018.
UID 01TA4943991

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